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No. 82-1687

In the Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE WUAGNEUX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ROBERT J. ERICKSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, in determining that the description of the items to be seized in a search warrant was adequately particularized, the court of appeals erred in referring to the supporting affidavit that was neither incorporated by reference or affixed to the search warrant.

2. Whether the federal agents executing the search warrant conducted a general exploratory search.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A81) is reported at 683 F.2d 1343. The oral order of the district court (Pet. App. A84-A90) denying the motion to suppress is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1983. A petition for rehearing was denied on January 14, 1983 (Pet. App. A82-A83). On March 11, 1983, Justice Powell extended the time in which to file a petition for a writ of certiorari to and including April 14, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner, the president and principal stockholder of Sage Corporation, was convicted of conducting the affairs of Sage through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) ("RICO") (Count 1). In addition, petitioner was convicted of embezzlement of union pension funds, in violation of 18 U.S.C. (Supp. V) 664 (Count 2), mail fraud, in violation of 18 U.S.C. 1341 (Counts 5-8), submission of a false statement intended to influence action upon a loan application, in violation of 18 U.S.C. 1014 (Count 9), and failure to report income on his federal tax returns, in violation of 26 U.S.C. 7206(1) (Counts 10-13). Pet. App. A3, A4. He was sentenced to ten years' imprisonment on the RICO count; five years' imprisonment on the mail fraud counts, to be served concurrently with the RICO sentence; two years' imprisonment on the fraudulent statement count, to be served consecutively to the mail fraud sentence but concurrently with the RICO sentence; and three years' imprisonment on the tax fraud counts, to be served consecutively to the sentence on the false statement count but concurrently with the RICO sentence. Petitioner was also fined $5,000 on each of the four tax fraud counts, placed on three years' probation on the embezzlement count, and ordered to make restitution of $191,654 to the union pension fund. 4 R. 870.[1]

1. The evidence at trial, the sufficiency of which petitioner does not contest, showed that Sage Corporation and its various subsidiaries were engaged in the construction of a number of condominium and office building projects in the south Florida area during the early and mid 1970's. Petitioner, as Sage's chief executive officer, engaged in a persistent pattern of illicit activities designed to secure

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[1] "R." refers to the official Record on Appeal; "S.R." refers to the Supplemental Record on Appeal.

extensions of credit for his financially-beleaguered corporation by means of kickbacks and fraud. The targets of petitioner's activities included two union pension funds, an annuity fund, a real estate investment trust, the Florida State Department of Insurance, and a commercial bank. In addition, the evidence showed that petitioner realized substantial income from various activities that he failed to report on his individual income tax returns for 1973-1976. Pet. App. A4-A6.

2. The government's case was based in part on documents seized during a warrant search of the offices of Sage Corporation on August 3, 1977.[2] The events leading to issuance of the search warrant are as follows. During an investigation into the activities of Seymour Gopman, legal counsel to a labor union, federal agents learned that funds had been laundered through Sage Corporation as part of a $700,000 kickback scheme involving union health care plans; that Gopman had received a $25,000 kickback for arranging a $500,000 loan for Sage from a union pension fund; and that Sage had received a $400,000 loan—made without proper authorization—from a second union pension fund. A magistrate issued a search warrant authorizing the search of Sage's corporate offices and the seizure of various business records evidencing financial transactions between Sage and labor union officials, pension funds, and sham entities based on these activities, which were described in the affidavit supporting the warrant application. Pet. App. A24, A33.[3]

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[2]Approximately 45 such documents were introduced in evidence at petitioner's trial (see 7 R. 687-702, 723; 16 R. 216, 256-303).

[3]Specifically, the warrant authorized the seizure of evidence of:

(1) the receipt and disbursement of kickback funds;

(2) the interest in Sage Corporation by Seymour Gopman, Bernard Rubin, and other labor union officials or nominees for these persons;

After the warrant was issued, IRS Agent Vincent O'Dea assembled the 10 to 12 agents who had been assigned to assist in the search of Sage (8 S.R. 14-15). O'Dea then "explained the case that he was working, reviewed the warrant, the affidavit, and talked to [them] in terms of what records [they] would be looking for * * *" (16 R. 198; see also 5 S.R. 48-49, 145-146; 7 S.R. 10, 13; 5 R. 29, 33-36, 41; 16 R. 199-200). He told the assembled agents "[a]ll that he knew" (16 R. 295). The agents were additionally given an opportunity to read the warrant and supporting affidavit (8 S.R. 18; 5 R. 71-72; 16 R. 199).

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(3) records of payment to Gopman, Rubin, or other labor union leaders in cash, check, bond, property, etc.;

(4) loan records reflecting the $500,000 teamster trust fund loan and its subsequent disbursement;

(5) loan records reflecting the $400,000 District Council Trust Fund loan and its subsequent disbursement;

(6) records of correspondence, agreements, loans, or other financial arrangements between Gopman, Rubin, Fortune Services, union officials or other persons or entities acting in their behalf and Sage Corporation;

(7) records of Sage's subsidiaries and any interest in them by Gopman, Rubin, or any other labor official or nominees acting on their behalf;

(8) records of any financial transactions between Sage Corporation and its subsidiaries and Gopman, Rubin, or other union officials or their nominees or entities acting in their behalf;

(9) the receipt by Sage Corporation and disbursement of funds from Ace Services, Fortune Services, Seymour Gopman or his law firm;

(10) records of any financial transactions between labor union trust funds and Sage Corporations or its subsidiaries, which are evidence of violations of 26 U.S.C. 7201, 7203 and 7206(1), 18 U.S.C. 664, 18 U.S.C. 1954, 1962, and 29 U.S.C. 501; and

(11) property that constitutes evidence of the above-enumerated offenses, fruits of the crimes named-above and property which is or has been used to commit the crimes enumerated herein.

After the briefing, the agents drove to the Sage offices where they were assigned specific rooms to search (8 S.R. 16). The agents then went through Sage's records and set to one side documents that they believed came within the terms of the warrant (16 R. 205-206). Thereafter, Agent O'Dea and Department of Justice Strike Force Attorney Marty Steinberg, who were supervising the search, double-checked all of the records set aside to make sure that only authorized records were seized (5 S.R. 48-49, 143-144, 147; 8 S.R. 18, 25-26; 5 R. 38, 50-52, 72; 16 R. 206-207, 208).[4] At the end of the two-day search (8 S.R. 19), the agents had seized 588 items (see 1 S.R. 52-81) containing more than 50,000 individual documents (11 R. 215). However, this constituted only "[a] very small portion" of Sage's records (5 S.R. 48), less than 2% of the total (8 S.R. 20-21; 5 R. 75; 12 R. 2087-2088; 16 R. 317-318).

3. After a full evidentiary hearing, the district court found that "the search warrant * * * complied with all constitutional requirements and properly authorized the seizure of the items taken" (Pet. App. A85). The district court held that the warrant described the items to be seized with sufficient particularity (*id.* at A88-A89) and that all of the documents that the government intended to introduce at trial were seized within the terms of the warrant (*id.* at A90).

The court of appeals affirmed (Pet. App. A1-A81). The court held, *inter alia*, that the description of 10 of the 11 categories of records to be seized contained in the warrant was sufficiently particularized (*id.* at A27-A28). Although the court deemed the remaining category, relating to "the receipt and disbursement of kickback funds," to be ambiguous, the court held that the ambiguity was dispelled by the

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[4]This procedure was followed out of an abundance of caution; Steinberg testified that special knowledge of the case would not have been required for execution of the warrant (5 S.R. 144).

description of the extensive kickback scheme found in the affidavit (*id.* at A28-A33). The court of appeals additionally held that the scope of the ensuing search, albeit extensive, was reasonably required in view of the complexity of the financial transactions under investigation (*id.* at A34-A43).

ARGUMENT

1. Petitioner asserts (Pet. 12) that the search warrant failed entirely to describe with particularity the items to be seized. Petitioner contends (*id.* at 10-25) specifically that the court of appeals erred in looking to the supporting affidavit to supply particularity to the phrase "the receipt and disbursement of kickback funds" because the affidavit was neither incorporated by reference in nor affixed to the search warrant. Petitioner's attack on the sufficiency of the warrant was carefully considered by the court of appeals and warrants no further review.

a. Petitioner's broad-gauge attack on the sufficiency of the warrant is insubstantial. It is well recognized that a warrant is sufficiently particularized for constitutional purposes if it "enable[s] the searcher to reasonably ascertain and identify the things which are authorized to be seized." *United States* v. *Cook*, 657 F.2d 730, 733 (5th Cir. 1981). The standard, however, "is one of practical accuracy rather than technical nicety." *United States* v. *Johnson*, 541 F.2d 1311, 1313 (8th Cir. 1976). It allows for a "practical margin of flexibility" depending upon the circumstances of the case. *Id.* at 1315; see also *United States* v. *Jacob*, 657 F.2d 49, 52 (4th Cir. 1981), cert. denied, 455 U.S. 942 (1982); *United States* v. *Coppage*, 635 F.2d 683, 686-687 (8th Cir. 1980).

As the court of appeals recognized (Pet. App. A19-A22), this principle of flexibility is especially applicable in cases such as this, in which law enforcement officers are investigating complex white-collar crimes. In such cases, officers

"often cannot, know in advance precisely what they will find when they search through files pursuant to a warrant" (*United States* v. *Abrams*, 615 F.2d 541, 548 (1st Cir. 1980) (Campbell, J., concurring)), and it is therefore virtually impossible for officers to supply an exact description of the items they seek. See, *e.g.*, *Sovereign News Co.* v. *United States*, 690 F.2d 569, 576-577 (6th Cir. 1982), petition for cert. pending, No. 82-1676 (filed Apr. 11, 1983). Because of this, courts have commonly upheld the sufficiency of warrants containing generic descriptions of documents to be seized in investigations centering on complex illegal schemes "whose existence [can] be proved only by piecing together many bits of evidence." (*Andresen* v. *Maryland*, 427 U.S. 463, 481 n.10 (1976)).

In *Andresen*, officers investigating a complex real estate fraud obtained a search warrant authorizing the seizure of an extensive array of documents relating to the sale of a particular parcel of land, "together with other fruits, instrumentalities and evidence of crime at this [time] unknown" (see 427 U.S. at 481 n. 10). Rejecting the claim that the entire warrant constituted a general warrant the Court stated (*ibid.*):

> Like a jigsaw puzzle, the whole "picture" of petitioner's false pretense scheme with respect to Lot 13T could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little. The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession.

The courts of appeals have followed this Court's teaching. See, *e.g.*, *Sovereign News Co.* v. *United States, supra* (generically described business records); *United States* v.

Smith, 686 F.2d 234, 237-238 (5th Cir. 1982) (warrant covering "documents pertaining to the commercial rental and leasing of recorded video tapes"); *United States* v. *Hershenow*, 680 F.2d 847, 851-852 (1st Cir. 1982) (warrant covering "all accident patient files"); *United States* v. *Jacob, supra*, 657 F.2d at 52 (a wide variety of records from an office of a lawyer engaged in a complex fraudulent scheme); *National City Trading Corp.* v. *United States*, 635 F.2d 1020, 1021, 1026 (2d Cir. 1980) (warrant authorizing seizure of various generically described records of the corporation and unnamed "persons associated with it"); *United States* v. *Bithoney*, 631 F.2d 1, 2 (1st Cir. 1980), cert. denied, 449 U.S. 1083 (1981) (warrant covering all documents evidencing Social Security fraud on part of 17 named individuals); *United States* v. *Brien*, 617 F.2d 299, 306 (1st Cir.), cert. denied, 446 U.S. 919 (1980) (warrant covering business records of Lloyd, Carr & Co.); *United States* v. *Louderman*, 576 F.2d 1383, 1389 (9th Cir.), cert. denied, 439 U.S. 896 (1978) (warrant covering documents and records pertaining to the efforts of defendant's company to obtain confidential information from the telephone company").

The present warrant satisfied the Fourth Amendment's particularity standard. As the supporting affidavit indicated, the agents had ample cause to believe that a substantial number of documents relating to a well-defined kickback scheme and two pension fund loans would be found on Sage's premises, but it was virtually impossible for the agents to know beforehand what the specific documents might be. Accordingly, the warrant authorized the seizure of generically-defined documents relating to the two specific union pension fund loans to Sage. It allowed the seizure of records showing financial arrangements and fund transfers between Sage, Fortune Services, Ace Services, and Gopman or his law firm. It authorized the seizure of records showing the interest of Gopman, Rubin or other labor officers in Sage or their receipt of funds from Sage.

Finally, the warrant covered documents relating to the named individuals, entities, and transactions pertaining to the violation of specific tax, labor, and racketeering offenses. In short, the warrant enabled the officers to identify the items sought with reasonable certainty.

b. Nor does the court of appeals' recourse to the supporting affidavit to define the phrase "the receipt and disbursement of kickback funds" create any occasion for further review. First, we question the necessity of the court of appeals' reliance upon the affidavit. As this Court made clear in *Andresen* (427 U.S. at 480-482), the provisions of a warrant must be read as a whole, not in isolation, in determining the particularity of the warrant. See also *United States* v. *Johnson*, 690 F.2d 60, 64 (3d Cir. 1982), cert. denied, No. 82-5869 (Feb. 22, 1983). Here, the warrant specifically referred to various records that memoralized transactions involving unions, labor officials (including Gopman), Fortune Services and Ace Services, and entities acting on behalf of labor officials—all designations pertaining to "the receipt and disbursement of kickback funds." Additionally, it referred to two specific loans, both of which involved suspected kickbacks. Read in the context of the warrant as a whole, the instant reference to "kickback funds" is no less particularized than the terms of the warrant sustained by this Court in *Andresen*.[5]

In any event, the court of appeals properly took notice of the supporting affidavit in the circumstances of this case. To be sure, as petitioner observes (Pet. 19-20), courts that have

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[5]For example, the warrant that was approved in *Andresen* specified that the records pertaining to unnamed "others" involved in the conveyancing under investigation could be seized, as well as correspondence and memoranda to or from unidentified "lienholders," "noteholders," and "trustees" (see 427 U.S. at 480 n.10). Moreover, the warrant in *Andresen* authorized seizure of records "showing or tending to show a fraudulent intent and/or knowledge" (*id.* at 481 n.10).

referred to an affidavit to supply specificity to an ambiguous term in a search warrant have normally done so only where the warrant incorporates the affidavit and the affidavit is affixed to the warrant. Such a requirement serves to limit the discretion of the officers as to what may be seized and, further, to apprise the person subjected to the search of its limits. Rigid adherence to this rule is not required, however, when the reasons for the rule are not present.

The court of appeals carefully considered and distinguished (Pet. App. A30-A32 n.6) the cases on which petitioner now relies. It noted that the twin purposes of incorporation were substantially satisfied in this case. Despite the fact that the affidavit was sealed for security reasons and accordingly was not affixed to the warrant, it nonetheless served to limit the executing officers' discretion because the "affidavit was brought to the search site, Agent O'Dea was present and had previously explained the contents of the affidavit to the agents and given them an opportunity to read it" (*id.* at A30-A31 n.6). Similarly, the need to inform petitioner of the scope of the authorized search was satisfied. The court below explained (*id.* at A31-A32 n.6; citation omitted):

> [T]he warrant itself and an inventory of items seized was left on the premises. While the affidavit was initially sealed, presumably to protect the secrecy of ongoing Strike Force investigations and grand jury proceedings, the record indicates that the affidavit was made available to [petitioner] for use in preparing the motion to suppress. In the ordinary case it is preferable that the person whose premises are to be searched be informed of the searching agents' authority at the time

> of the search; however this was done so far as practicable was done so far as practicable in this case, and [petitioner] was provided with all the relevant information at a reasonable time thereafter. [6]

Under the circumstances it was reasonable for the court below to look to the supporting affidavit in assessing the particularity of one portion of the search warrant.

Finally, even if the court erred in taking the supporting affidavit into account, petitioner is not entitled to relief. Assuming that the phrase "the receipt and disbursement of kickback funds" is general in nature, it is generally recognized that infirm portions of a search warrant should be severed in determining the admissibility of evidence.[7] As the court of appeals agreed (Pet. App. A27-A28), the search warrant was fully particularized as to 10 of the 11 categories of items listed. In the proceedings below petitioner did not identify any specific documents introduced in evidence that were outside the scope of the valid warrant categories (see 16 R. 234, 240). Nor does petitioner now point to any evidence employed at trial that was seized only as evidence

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[6]Because the warrant itself, read as a whole, adequately indicated the scope intended for the disputed element of the warrant, at least for the limited purpose of informing petitioner as to the officers' authority, petitioner's complaint (Pet. 24 & n.6) that disclosure of the affidavit occurred after the search misses the mark.

[7]See *Sovereign News Co.* v. *United States, supra*, 690 F.2d at 576; *United States* v. *Riggs*, 690 F.2d 298, 300 (1st Cir. 1982); *United States* v. *Christine*, 687 F.2d 749, 758 (3d Cir. 1982); *United States* v. *Freeman*, 685 F.2d 942, 952 (5th Cir. 1982); *United States* v. *Gilman*, 684 F.2d 616, 618 (9th Cir. 1982); *United States* v. *Cardwell*, 680 F.2d 75, 78-79 (9th Cir. 1982); *United States* v. *Cook, supra*, 657 F.2d at 735. But cf. *United States* v. *Apker*, 705 F.2d 293, 307-308 (8th Cir. 1983). The decision in *Apker*, rendered by a divided panel, does not take issue with the general proposition upon which we rely, but declines to extend it to special circumstances, present in that case, that are not present here. A petition for rehearing with a suggestion for en banc consideration that was filed by the government is presently pending in *Apker*.

of "the receipt and disbursement of kickback funds."[8] Accordingly, the evidence admitted at petitioner's trial was seized pursuant to the fully particularlized portions of the search warrant.

2. There is no merit to petitioner's suggestion (Pet. 25-29) that the execution of the search was necessarily overbroad simply because the agents conducting it had no previous familiarity with the Gopman investigation and because Agent O'Dea and Strike Force Attorney Steinberg made the ultimate decision regarding what documents would be seized. As the record shows, the seizures were determined by "the criteria of the search warrant" (5 R. 52), not by the unbounded discretion of O'Dea and Steinberg.

Beyond this, we know of no authority—and petitioner cites none—holding that all agents who participate in a search must be versed in the underlying investigation. Any such requirement would be unworkable given the large number of agents that is sometimes required to conduct a thorough and expeditious search in connection with a complex criminal investigation. See, *e.g.*, *United States* v. *Heldt*, 668 F.2d 1238, 1253 & n.10 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982) (more than 150 agents involved in search). Here, the government took positive steps to minimize the intrusiveness of the document search, both by conducting a thorough pre-search briefing for the agents and by stationing supervisory personnel on the scene to make certain that any seizures to be made were within the purview of the warrant. See *United States* v. *Heldt*, *supra*, 668 F.2d at 1261-1262; *National City Trading Corp.* v.

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[8]Indeed, the $700,000 health benefit kickback scheme described in the affidavit (see Pet. App. A33) was not a part of the government's proof at trial. (Petitioner has since been convicted in a separate trial for his participation in that kickback scheme. His appeal is presently pending before the Eleventh Circuit in *United States* v. *Caporole*, No. 82-5964.)

United States, supra, 635 F.2d at 1023. Rather than tainting the search, these measures tended to assure that the search was confined to its authorized limits. See *Andresen* v. *Maryland, supra*, 427 U.S. at 482 n.11.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ROBERT J. ERICKSON
Attorney

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[9]We note that less than 2% of the documents found on the premises were seized (see page 5, *supra*). The relatively limited seizure attests to the fact that there was no sweeping seizure of Sage's documents.

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